In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

Nos. 483, 484

LAWRENCE SPEISER, *Appellant,* vs. JUSTIN A. RANDALL, as Assessor of Contra Costa County, State of California, *Appellee.*	No. 483
DANIEL PRINCE, *Appellant,* vs. CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, *Appellee.*	No. 484

Appeal from the Supreme Court of the State of California.

APPELLEES' CONSOLIDATED BRIEF.

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OPINIONS BELOW.

The Superior Court of the County of Contra Costa in the case of *Speiser v. Randall* issued an unreported opinion, which is set forth as Appendix A of the Ju-

risdictional Statement. The opinion of the Supreme Court of the State of California in said case appears on pages 22-23 of the Record and is officially reported in 48 Cal. 2d 903 and unofficially reported in 311 P. 2d 546.

The Superior Court of the City and County of San Francisco in the case of *Prince v. City and County of San Francisco* issued an unreported opinion, which is set forth on pages 50-59 of the Record. The opinion of the Supreme Court of the State of California in said case appears on pages 64-67 of the Record and is officially reported in 48 Cal. 2d 472 and unofficially reported in 311 P. 2d 544.

The opinions of the California Supreme Court in the causes at bar incorporate the reasoning and the conclusions of that Court in a companion case, *First Unitarian Church of Los Angeles v. County of Los Angeles,* now on file in this Court as Oct. Term 1957, No. 382 (R. 35-89) and which is officially reported in 48 Cal. 2d 419 and unofficially reported in 311 P. 2d 508.

JURISDICTION.

The judgments of the Supreme Court of the State of California in these causes were filed in that Court on April 24, 1957. Notices of appeal were filed with the Supreme Court of the State of California on May 27, 1957.

Appellants invoked the jurisdiction of this Court under Title 28, U.S.C., Section 1257(2), pursuant to

a consolidated jurisdictional statement for both cases filed on September 19, 1957.

Respondents filed a Motion to Dismiss, but this Court entered an order noting probable jurisdiction and consolidating the cases for hearing on the Summary Calendar on November 25, 1957. (R. 71.)

QUESTIONS PRESENTED.

The State of California by action of its Legislature and a vote of its people, in 1952, enacted a constitutional amendment providing, in part, that no person or organization advocating forcible overthrow of the federal or state government or support of a foreign government against the United States in the event of hostilities would receive any tax exemption from the state or subordinate agencies. The Legislature, in 1953, enacted procedural legislation requiring establishment of this requisite fact by a declaration under oath in certain cases involving property tax exemption.

California by a constitutional provision exempts one thousand dollars of the property of each veteran, or his certain relatives, of certain specified wars and campaigns from state property taxation provided the assessed value of the total property of the veteran or relative does not exceed $5,000.00. In these cases, two veterans, plaintiffs in the trial Court and appellants in this Court, sought the stated property tax exemption without executing the required declaration of

non-advocacy appended to the property tax return. The appellee assessor, Justin A. Randall, of Contra Costa County, and the Assessor of the appellee City and County of San Francisco denied the exemptions. After appellants brought separate actions to challenge said rulings, the action of the assessors was ultimately upheld by the judgments and opinions of the California Supreme Court.

The questions presented are, with one exception, related to the asserted invalidity, under the United States Constitution, of the state constitutional provision precluding grants of tax exemption to those who advocate violent overthrow of the government and of the procedural statute which implements said provision, as applied to the property tax exemption given under California law to a veteran by reason of his military service.

Briefly stated, these issues are raised:

1. Does an oath declaration requirement applying only to present, personal advocacy of forcible overthrow of the federal and state governments and support of a foreign government in event of hostilities, as a condition to the award of a State tax exemption to veterans for military service, violate freedom of speech?

2. Is a state prohibited from utilizing a narrow form of declaration in a form of oath or affirmation approved by this Court as a condition to qualify for a property tax exemption pursuant to conditions prescribed by the people of the state in their state Constitution?

3. Does such requirement violate procedural due process under the Fourteenth Amendment?

4. Does the selection by a state of certain objects as the recipients of a subsidy in the form of a tax exemption and the imposition of conditions for qualification for said bounty, raise any federal question of equal protection within the cognizance of this Court?

5. Does the imposition by a state of such conditions for qualification for tax exemption conflict with federal penal statutes regulating subversion so as to violate United States Constitution Article VI, Clause 2?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The citations of relevant Federal and state constitutional and statutory provisions are here listed. The full text of same is set forth in Appendix "A" of this brief.

United States Constitution, First Amendment;
United States Constitution, Fourteenth Amendment;
United States Constitution, Article VI, clause 2;
California Constitution:
Article XIII, Section 1¼;
Article XX, Section 19;
California Revenue and Taxation Code:
Sections 32, 26.

STATEMENT OF THE CASE.

The facts in both of these cases are based solely on stipulations introduced in the respective trial Courts. (See R. 18-20, 45-49.) It should be noted that the conclusions of law of the trial Court in the *Prince* case found that that appellant did not qualify under the oath provisions "in that he has not shown himself to be a person entitled to receive the said exemption." (R. 61.) As the California Supreme Court held, an assumed fact as to the non-existence of advocacy is not enough for the purposes of taxation.

First Unitarian Church v. County of Los Angeles, supra.

In the *Prince* case, the Superior Court of the City and County of San Francisco rendered judgment against Prince in an action brought by him against the City and County of San Francisco to recover taxes paid under protest, together with a full and carefully documented opinion of Judge William T. Sweigert. (R. 50-59.)

In the *Speiser* case, the Superior Court of Contra Costa County rendered judgment in favor of appellant Speiser in an action for declaratory relief against Justin A. Randall, the Assessor of said county.

Appeals were taken to the California Supreme Court in both cases, where the Court, after exhaustive briefing and full oral argument, decided that no federal or state constitutional provision is violated by requiring a veteran to take a narrowly drawn oath limited to present, personal non-advocacy of forcible

overthrow of the United States and State governments and of support of a foreign government against the United States in the event of hostilities as a reasonable condition to qualification for a tax exemption given specially to veterans by reason of their veteran status alone, as a reward for and incentive to patriotism.

Except for appellants' contentions as to violation of the Equal Protection clause by the State's choice of different procedures for qualification for different forms of taxes, which we contend do not present a Federal question at all, all Federal questions now presented by appellants were properly preserved, with one exception. The exception is the contention (Appellants' Consolidated Opening Brief, pp. 56-58) that aliens are denied Equal Protection by the requirement of qualifying for tax exemption by use of the declaration in question. This question was not presented to the Courts below.

SUMMARY OF ARGUMENT.

The State of California in adopting a constitutional amendment by the vote of the people and appropriate legislation in enforcement thereof, has exercised powers traditionally reserved to the states under our Federal system, insofar as it has provided a condition for qualification for the award of a tax exemption from taxes prescribed by state law. Neither the form of the oath, the scope of its coverage, or its effect im-

pinge on any prohibition of the Federal constitution. The limitation of the oath to speech which constitutes a present personal advocacy of forcible overthrow of government, removes from this case the question of any violation of the rights of free political discussion, which are preserved to the American people under the First and Fourteenth Amendments. As Chief Justice Hughes so appropriately stated in *De Jonge v. Oregon*, 299 U.S. 353, in distinguishing "free political discussion" from the use of speech to incite to violence and crime:

> ". . . These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse." (299 U.S. at 364.)

While the importance of the free speech guarantee cannot and should not be minimized, the application of presumptions and slogans do not solve particular problems in this field.

Ullmann v. United States, 350 U.S. 422, 428.

The importance of the determination by a state by constitutional amendment of its people even in the field of free speech, that certain regulation is needed, is to be given its proper significance.

American Communications Assn. v. Douds, 339 U.S. 382.

The requirement that a veteran subscribe to an oath or affirmation of non-advocacy of overthrow of the

United States and State government by force, violence or other unlawful means is not an improper invasion of the free speech guarantee.

Dennis v. United States, 341 U.S. 494;
American Communications Assn. v. Douds, supra;
Garner v. Board of Public Works of Los Angeles, 341 U.S. 716.

The present declaration requirement is narrower in its content and less sweeping in its effect than other forms of oath upheld by this Court. It does not concern belief, nor does it affect affiliations or extend beyond the scope of personal conduct. Cf. *American Communications Assn. v. Douds, supra.* Nor does the present oath concern past conduct or beliefs. Cf. *Garner v. Board of Public Works of Los Angeles, supra.*

When regulation is so designed, speech is subject to regulation limited to restriction of advocacy of forcible overthrow.

The present requirement is properly limited by the California Supreme Court to advocacy construed as an incitement to action. So construed, the California State Constitutional provision and statute are valid on their face, and as here applied.

Yates v. United States, 354 U.S. 298;
Dennis v. United States, supra.

The "clear and present danger" test does not apply in this case since the enactment before this Court is

specifically and narrowly directed to speech as limited to advocacy of forcible overthrow.

Dennis v. United States, supra;
Beauharnais v. Illinois, 343 U.S. 250.

And said test is not applicable to a state provision merely requiring qualification for benefits as distinguished from the imposition of criminal penalties. Cf. *Garner v. Board of Public Works of Los Angeles, supra; Gerende v. Board of Supervisors,* 341 U.S. 56.

As tested by the result of *American Communications Assn. v. Douds, supra,* the present regulation is an "indirect conditional, partial abridgment of speech." Political discussion is not infringed by regulation of the type of advocacy at bar.

Dennis v. United States, supra;
Haristades v. Shaughnessy, 342 U.S. 580.

Moreover, this particular type of speech ranks sufficiently low in the scale of values so as to justify regulation connected with the giving of an exemption to veterans for the purpose of stimulating and rewarding patriotism. Both from the standpoint of the existence of actual public danger in a time of grave emergency, and from the standpoint of protection of a valid state purpose in enforcing its veterans' and tax exemption programs, there is a sufficiently substantive evil to justify regulation. The determination by the state of the existence of such state purpose, and of the attainment of same by the enactments at bar is strongly persuasive. *Garner v. Board of Public Works of Los Angeles, supra.* Cf. *American Communications Assn. v. Douds, supra.*

Active allegiance to and participation in the defense of this Nation can be affirmatively encouraged by states.

In re Summers, 325 U.S. 561;
Hamilton v. University of California, 293 U.S. 245.

In view of such circumstances this lesser regulation is fully appropriate in relation to the state program involved.

The state requirement of an oath of non-advocacy of forcible overthrow does not violate procedural due process. The declaration requirement at bar is not void for vagueness since its language has been explicitly construed by Federal and state court decisions and gives fair notice of its application.

Dennis v. United States, supra;
United States v. Harriss, 347 U.S. 612;
Beauharnais v. Illinois, supra.

Nor does the declaration, in touching only *present* conduct, constitute a so-called test oath.

Garner v. Board of Public Works, supra.

The oath does not deny equal protection since the state has the power to classify in the determination of objects for its tax laws, for exemptions therefrom and for procedures for qualifying for same.

Leigh v. Green, 193 U.S. 79;
U. S. v. Petrillo, 332 U.S. 1;
U. S. v. Burnison, 339 U.S. 87.

Moreover, supposed defects as to the application of these enactments to other classes of taxpayers, i.e.,

aliens, are not available to appellants either under the Federal Constitution or state law.

Bode v. Barrett, 344 U.S. 583;
U. S. v. Petrillo, supra.

The doctrine of supersession of state enactments by Federal law cannot properly be asserted in this case. *Pennsylvania v. Nelson,* 350 U.S. 497, merely dealt with the occupation of the field of subversion by the Federal government in regard to *criminal* prosecutions for sedition. In the absence of any expression of Congressional intent so as to supersede state regulations prescribing loyalty declaration requirements for valid state civil purposes, such as tax exemptions, application of the doctrine of supersession would raise grave constitutional questions.

Bernhardt v. Polygraphic Co., 350 U.S. 198, 202.

No evidence exists in the present case of the need for centralization in the Federal Government of administration of state programs requiring establishment of non-advocacy of violent overthrow in connection with valid state purposes and the conduct of state government. *Clark v. Allen,* 331 U.S. 503, 516-517.

In the absence of any "parallel" Federal regulation concerning conditions of qualification for state office, employment or tax exemption, and in the absence of any expression of a purpose to supersede such regulations, the state enactments at bar are presently valid and enforeable.

Davis v. Beason, 133 U.S. 333;
California v. Zook, 336 U.S. 725;
Clark v. Allen, supra.

ARGUMENT.

I.

A LEGISLATIVE DETERMINATION THAT CERTAIN CONDUCT, EVEN THOUGH CAST IN THE FORM OF SPEECH, IS SUBJECT TO REGULATION IS ENTITLED TO BE GIVEN SERIOUS CONSIDERATION.

Respondents agree with appellants that any regulation in the area of basic constitutional guarantees is subject to close scrutiny. To state, however, as do appellants that laws which "infringe" on First Amendment freedoms are not protected by a presumption of constitutionality is to beg the entire question. Moreover, appellants ignore recent case authority according substantial weight to the legislative intendment in cases involving basic civil and political as well as economic liberties. As was stated by the majority of the United States Supreme Court in upholding the validity of the anti-Communist affidavit requirement for labor leaders in *American Communications Association v. Douds, supra,* 339 U.S. at 401, "(E)ven restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberation'". See: *Dennis v. United States, supra,* 341 U.S. at 506.

In the most recent case involving this question, this Court, in *Ullmann v. United States, supra,* 350 U.S. at 428, held, with Justice Reed dissenting on this point, that "no constitutional guarantee enjoys preference." Such a conclusion supports our contention that each such case must be examined on its own facts, without regard to the fiction of presumption, but with regard

both to the just claims of the minority to a sphere of immunity from regulation of basic constitutional rights and to the rights of the majority to the protection of the system of government under which substantial rights of the minority as well as of the majority are secured. Thus, a determination by two different legislatures, both as to the constitutional provision and the statute, and by the vote of the people in approving the former is entitled to great weight in so far as it says that governmental employment and fiscal privileges shall be denied to those who by their speech incite forcible overthrow of the government. See *American Communications Association v. Douds, supra.*

Since the declaration of non-advocacy, which is here in issue, has been determined by the Supreme Court of the State of California to serve an important public purpose in relation to the veteran's exemption and the encouragement of patriotism, which that exemption is designed to stimulate, it is not appropriate for appellants to seek to controvert that purpose. The State Constitutional Amendment and Statute here in question must be accepted as expressions of a serious State purpose, and neither the motivation which prompted them, nor the effectiveness which they may have had are now properly open to question, except on establishment of the absence of any rational connection between the restriction imposed and the purpose to be served.

American Communications Association v. Douds, supra, 339 U.S. at 400;

Dennis v. United States, supra, 341 U.S. at 506.

As we shall show, the legislation, as interpreted by the California Supreme Court, evidences such rational connection.

II.

THE OATH REQUIREMENT IS A VALID RESTRAINT UPON THAT SPEECH AMOUNTING TO ADVOCACY OF OVERTHROW OF THE GOVERNMENT BY UNLAWFUL MEANS.

The oath reads: "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." (R. 43.) The key word in the oath is "advocate". It has been defined to have the meaning: "To speak in favor of; defend by argument, one who espouses, defends or vindicates any cause by argument; a pleader, upholder, as an advocate of the oppressed". *Ex parte Bernat,* 255 Fed. 429, 432.

The loyalty declaration requirement in question is a regulation of conduct and has nothing to do with the private beliefs of any person. In fact, it is misleading to refer to the declaration at bar as being a "loyalty" oath at all. There is no attempt at bar to probe matters of belief or conscience; loyalty is treated only as the end sought to be promoted, not as a subjective state of mind to be inquired into. Necessarily, the type of conduct to which such regulation is designed to apply admittedly is speech; however, as we shall show, conduct in the form of speech

of such negative value is not for that reason immune from regulation for a proper interest. "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction." *Dennis v. United States, supra,* 341 U.S. at 508; also see at 502 ("The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion.")

In contending that this form of oath transgresses the rule of *Yates v. United States, supra,* that advocacy of ideas as distinguished from action may not be inhibited, appellants make a fundamental error. Appellants fail to recognize that the effect of the particular regulation on speech must be measured by the effect of the language of the oath, *as properly interpreted.*

In the *Yates* case, this Court held that the broad language of the Smith Act (recodified as 18 U.S.C. § 2385, 62 Stat. 808), which covers not only advocating, but also abetting, advising and teaching the "duty, necessity, desirability or propriety" of forcible overthrow would be interpreted to be limited to "advocacy directed at promoting unlawful action" so as to avoid constitutional questions:

> "We are thus faced with the question whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent. We hold that it does not . . .

"We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation. . . . The statute was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action."

354 U.S. at 318-320.

Further, the opinion held that a purpose to cause others to engage in resistance to the government "perhaps during war or during attack upon the United States from without" would be covered by the statute and stated:

"It is not necessary for conviction here that advocacy of 'present violent action' be proved."

354 U.S. at 337.

The opinion of the California Supreme Court in the companion case of *First Unitarian Church of Los Angeles v. County of Los Angeles* is in full compliance with the mandate of this Court in the *Yates* case. The California opinion (R. 47, *Unitarian Church* case) states that the oath requirement "is not a limitation on mere belief but is a limitation on action—the advocacy of certain prescribed conduct." The state opinion significantly adds, "Advocacy constitutes action and the instigation of action, not mere

belief or opinion." Further in the opinion (Id., R. p. 53), the California Supreme Court, in a discussion of *Dennis v. United States, supra,* directly defined and thus limited the oath requirement *to only that activity prescribed by the Smith Act* (italics added):

> "In that case [Dennis v. United States] the court upheld an instruction to the jury that if the defendants actively advocated governmental overthrow by force and violence as speedily as circumstances would permit, then as a 'matter of law . . . there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution.' *In the present case the constitutional provision is concerned with those who advocate the same prohibited activity.*" (Italics added.)

Also see:

Gilbert v. Minnesota, 254 U.S. 325, 333.

Thus the California Supreme Court has placed the same interpretation and the same limitations on the application of the tax exemption qualification requirement as this Court has done in regard to the Smith Act in the *Yates* and *Dennis* cases. See *Garner v. Board of Public Works of Los Angeles, supra,* 341 U.S. at 723-724 (oath containing similar wording); *Beauharnais v. Illinois, supra,* 343 U.S. at 253.

The reversal of the judgments of conviction in the *Yates* case was based merely on faulty instruction of the jury and represented an upholding and not a repudiation of the statutory language condemning the proscribed advocacy. Similar or broader language

than that used in the California Constitution and statutory provisions has been consistently upheld by this Court, in criminal prosecutions as well as in oath cases revoking civil benefits as well as conditioning qualification for same.

Dennis v. United States, supra;

American Communications Association v. Douds, supra;

Gerende v. Board of Supervisors, supra (oath form covered "advising" and "teaching", in addition);

Garner v. Board of Public Works, supra (similar form);

Pockman v. Leonard, 39 Cal. 2d 676, 249 P. 2d 267, appeal dismissed for want of a substantial federal question, 345 U.S. 962;

Hirschman v. County of Los Angeles, 39 Cal. 2d 698, 249 P. 2d 287, cert. denied as *Petherbridge v. Los Angeles County,* 345 U.S. 1002;

Beauharnais v. Illinois, supra;

United States v. Harriss, 347 U.S. 612.

See:

Cole v. Arkansas, 338 U.S. 345.

Said cases have all upheld regulations expressly directed to "advocacy" of forcible overthrow.

Such delimitation of the meaning of the statute is also authorized under the rule of *American Communications Association v. Douds, supra:*

> "The congressional purpose is therefore served if we construe the clause, 'that he does not believe in, and is not a member of or supports any organ-

> ization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods,' to apply to persons and organizations who believe in violent overthrow of the Government as it presently exists under the Constitution as an objective, not merely a prophecy." (339 U.S. at 407.)

Justice Frankfurter, while disagreeing with the oath in question in so far as it expressly sought to elicit matters of belief, nevertheless also observed that an oath could be upheld as restricted to "disavowal . . . of active belief, as a matter of present policy, in the overthrow of the Government of the United States by force." (339 U.S. at 421-422.) The oath in the case at bar does no more than this.

Also see *Fox v. Washington,* 236 U.S. 273, 277, the classic opinion of Justice Holmes, which upheld the statute as construed by the state so as to punish advocacy.

Express answer as to whether a declaration requirement such as that before this court inhibits belief improperly or at all is found in *Garner v. Board of Public Works of Los Angeles, supra,* 341 U.S. at 723, 724, where a broader form of oath by affidavit covering the advising and teaching, as well as the advocacy of forcible overthrow and with certain retrospective features was sustained as interpreted. (341 U.S. at 724.)

III.

THE "CLEAR AND PRESENT DANGER" RULE DOES NOT INVALIDATE THE STATE ENACTMENTS AT BAR.

Respondents contend that the "clear and present danger" test was never intended to apply to a civil proceeding of a state designed for the determination of the question of qualification for tax-exemption benefits. Cf. *Beauharnais v. Illinois, supra,* 343 U.S. at 266. However, even if the test were applicable, which we do not concede, nevertheless the standards of the "clear and present danger" test should be deemed to have been satisfied. (See infra, IV (2).) Both of these contentions will be made in this brief.

The "clear and present danger" test has been placed in true perspective by this Court in *American Communications Association v. Douds, supra,* 339 U.S. at 397-398, where, in commenting on the rule as enunciated in *Schenck v. United States,* 249 U.S. 47, 52, and interpreted by *Whitney v. California,* Concurring Opinion, 274 U.S. 357 at 372, 377, and *Bridges v. California,* 314 U.S. 252, 263, the Court held that no "absolutist test" is intended.

> "But in suggesting that the substantive evil must be serious and substantial, it was never the intention of this Court to lay down an absolutist test measured in terms of danger to the Nation. When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the Nation is an absurdity. . . ."

Thus, the imminent danger test is a flexible standard—a restriction with a small effect on First Amendment freedoms and with a beneficial public purpose need not be justified by a showing of imminent danger. As the Court itself states, requiring such showing under those circumstances would be an "absurdity."

The United States Supreme Court has applied the "clear and present danger" test in the fact situation of an actual or impending prosecution for crime or criminal contempt seeking the imposition of a penal sanction against the one accused. Cf. *Beauharnais v. Illinois, supra,* 343 U.S. at 266. The *Schenck* case was a prosecution for conspiracy to violate the Espionage Act of 1917 by a publication which, while it criticized conscription, did not advocate insubordination or obstruction to recruiting. The *Whitney* case, with Justices Holmes and Brandeis concurring, affirmed a conviction for organizing and joining the Communist Labor Party of California. *Bridges v. California* involved merely the use of contempt to punish newspapers for comments on pending Court proceedings—no legislation was involved.

There is all the more reason to require a showing of clear and present danger to justify a criminal sanction, since incarceration during trial and imprisonment afterwards constitute a *complete* deprivation of the right of speech—of communication with

one's fellow man. Such a result is the serious effect which calls for the proper application of the doctrine.[1]

While appellant relies on a prior decision of the California Supreme Court in *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885, it will at once be noted that *Danskin* was decided four years before the statement of the "clear and present danger" rule by the United States Supreme Court in the *Douds* case. Moreover, as hereafter discussed, the *Danskin* case presents a situation totally dissimilar from that at bar in several basic respects, one of which is that a total prohibition against *all* speech, peaceable discussion as well as advocacy of violence, was contemplated by the regulation prohibiting the use of school auditoriums there invalidated.

There is still another reason why the "clear and present danger" standard need not be applied in the instant case. In the case at bar there is an express legislative determination that speech advocating the

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[1]Edward S. Corwin, leading constitutional authority, in "Bowing Out Clear and Present Danger", 27 Notre Dame Law, 325, 358, stated:

> "The outstanding result of the holding, undoubtedly, is that of *a declaration of independence by the Court from the tyranny of a phrase*. As expounded in the dissenting opinions of Justices Black and Douglas, the 'clear and present danger' formula is a kind of slide rule whereby all cases involving the issue of free speech simply decide themselves automatically. By treating the formula as authorizing it to weigh the substantive good protected by a statute against the 'clear and present danger' requirement, the Court rids itself of this absurd 'heads-off' automatism and converts the rule, for the first time, into a real 'rule of reason.'"

destruction of government will disentitle the speaker to certain tax exemptions. Thus the legislative branch, in this case, the Legislature and the people acting together, has expressly directed its legislation not merely to conduct in general but to speech in particular. In *Gitlow v. New York,* 268 U.S. 652, the Supreme Court upheld a state statute which made it a crime to "advocate . . . the duty, necessity or propriety of overthrowing . . . government by force or violence." The *Gitlow* case was cited and approved in *Dennis v. United States, supra,* 341 U.S. at 506, as standing for the proposition that federal constitutional review is different in the case where a state statute deals directly with speech by express regulatory legislation:

> "Gitlow, however, presented a different question. There a legislature had found that a certain kind of speech was, itself, harmful and unlawful. The constitutionality of such a state statute had to be adjudged by this Court just as it determined the constitutionality of any state statute, namely, whether the statute was 'reasonable'. Since it was entirely reasonable for a state to attempt to protect itself from violent overthrow, the statute was perforce reasonable."
>
> *Dennis v. United States, supra,* 341 U.S. at 506.

Thus, operation of the "clear and present danger" rule can properly be confined to situations where speech is not expressly treated by the legislature as creating such danger by the very nature of the utterance. Thus, in the *Schenck* case the legislation in question did not deal in speech terms or find, either

expressly or impliedly, that any speech imperiled any legitimate interest of society. In the *Whitney* case the speech and other conduct involved was ambiguous in its implications. In *Bridges v. California* no legislation at all allowed proscription of speech by a Court under the contempt power. No case involved speech that by its nature, i.e., its incitement of forcible overthrow, precluded any necessity for inquiry into the intent behind its utterance or the evil purpose sought thereby.

The Supreme Court itself, in the *Dennis* case, 341 U.S. at 505, recognized this very distinction in analyzing the *Schenck* case and similar holdings:

> "The rule we deduce from these cases is that where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime, e.g., interference with enlistment. The dissents, we repeat, in emphasizing the value of speech, were addressed to the argument of the sufficiency of the evidence."

The type of speech involved herein, even according to the excerpt from the concurring opinion of Holmes and Brandeis in *Whitney v. California, supra,* itself implies a finding of clear and present danger, in compliance with the rule laid down in that opinion that a finding of clear and present danger is supported when "immediate serious violence was to be expected or *was advocated,* or that the past conduct furnished

reason to believe that such *advocacy* was then contemplated." (274 U.S. at 376.) (Italics added.) As the Supreme Court stated in *Dennis v. United States, supra,* 341 U.S. at 509, in upholding Judge Medina's charge to the jury that as a matter of law there was sufficient danger of substantive evil to justify application of the Smith Act, "Certainly an attempt to overthrow the government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt." (341 U.S. at 509.)

Even the language of *Schneiderman v. United States,* 320 U.S. 118, 157, recognizes this "material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder *or other substantive evil* and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time." (Italics added by writer.) This Court held the former type of speech to be properly subject to Congressional control as a bar to naturalization; only said type of speech is here sought to be regulated.

The Supreme Court in the *Dennis* case, 341 U.S. at 502, answered the very argument advanced by appellants here, by holding that the Smith Act in restricting advocacy did not inhibit peaceable discussion:

"The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion. Thus, the trial judge properly charged the jury that they could not convict if they found that petitioners did 'no more than pursue peaceful studies and discussions or teaching and advocacy in the realm of ideas.' He further charged that it was not unlawful 'to conduct in an American college and university a course explaining the philosophical theories set forth in the books which have been placed in evidence.' Such a charge is in strict accord with the statutory language, and illustrates the meaning to be placed on those words. Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged."

See:

Harisiades v. Shaughnessy, supra, 342 U.S. at 592.

Thus, the nature of the speech at bar, advocacy of the forcible overthrow of government, justifies a direct speech regulation narrowly and explicitly drawn to meet the evil inherent in such speech. The clear and present danger rule does not, as we contend, apply to a non-criminal administrative proceeding involving no penal sanction, i.e., the establishment of grounds for qualification for a tax exemption as a special benefit.

While we agree that a village radical in a village square need not be criminally prosecuted for absurd or trivial exhortations, it is quite a different proposition to state that, if his exhortations are seriously intended as advocacy to incite violent overthrow of the government, he ought to be rewarded for his patriotism by being deemed entitled to a special tax benefit given to stimulate and reward patriotism.

IV.

THERE IS A REASONABLE RELATIONSHIP BETWEEN THE EVIL SOUGHT TO BE CONTROLLED AND A PROPERLY DELIMITED REGULATION OF SPEECH DETERMINED BY THE LEGISLATURE TO BE LEGITIMATELY RELATED TO A PROPER PUBLIC PURPOSE.

Appellant contends that the *Douds* case, in sustaining the validity of anti-subversive affidavits for labor leaders, carefully limited its holding to the situation where advocates of certain doctrines by reason of their position clearly presented a great danger to the country. But plaintiff has neglected to advert to the language of the *Douds* case which expresses its full holding:

> "On the contrary, however, the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court . . . We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the

existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' Cox v. New Hampshire, supra (312 U.S. at 574, 85 L. ed. 1052, 61 S. Ct. 762).

"When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. . . .

"On the other hand, legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights." (339 U.S. at 397-400.)

Cf.

Beauharnais v. Illinois, supra.

It will be the function of the respondent in this portion of its brief to demonstrate under the rule of the *Douds* case as set down above, that the present oath is a valid one, since (1) its effect upon First Amendment freedoms is "relatively small" and the public interest to be protected is substantial, in regard to both (2) the substantive evil worked by such speech and (3) the public good which the oath requirement is designed to foster. In thus making the *Douds* holding our text, we further propose, to the best of our ability, to demonstrate that the oath restriction here

at issue is constitutional under the rule of the very cases on which plaintiff attempts to rely.

1. The Effect of the Oath Upon First Amendment Freedoms Is Small.

As stated in the *Douds* case, a sufficient public interest may be favored over an "indirect, conditional, partial abridgment of speech." It is defendant's contention that there is no deprivation of First Amendment rights at all since the only speech that plaintiff need forego under this oath is already subject to restriction.

Has the plaintiff the right to advocate—to urge—the overthrow of the government of the United States and of this state by force, violence or unlawful means? The answer is an unequivocal "No!".

The landmark case of *Dennis v. United States*, 341 U.S. 494, held that advocacy of violent overthrow can be differentiated from peaceable discussion and regulated as such, and that although such advocacy contains elements of speech, nevertheless in the exercise of legislative judgment it is subject to control:

> "Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction." 341 U.S. at 508.

In arriving at this conclusion, the Supreme Court approved the holding of *Gitlow v. New York, supra*, that "it was entirely reasonable for a state to attempt to protect itself from violent overthrow." *Dennis v. United States, supra*, 341 U.S. at 506.

The *Dennis* case further held that the Holmes-Brandeis rationale of clear and present danger had to be discarded as an absolute and reinterpreted to cover what was never envisioned by them—"the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." 341 U.S. at 510.

We shall now do what appellants do not do—analyze the specifics of each oath in the cases on which we rely. Such a tabulation bears out our contention that the declaration requirement at bar is not only more limited than the forms of oaths held invalid but is more narrowly delimited than most of those upheld by the case law and is as moderate in its terms as any. In such tabulation it is vital to distinguish clearly oaths of "non-advocacy" from those of "non-belief", "non-membership" and "non-affiliation", particularly to apply to past acts. It is also of importance to determine whether the consequence of failure to take any oath is a deprival of rights, a revocation of privileges (or benefits) or the mere denial of a qualification for privileges (or benefits). While we agree with appellants' contention that even a privilege cannot be withheld upon an unconstitutional condition, so to state begs the very question to be determined upon examination of the oath at bar. It is our contention that the oath at bar, being merely one of *non-advocacy* of forcible overthrow and being a condition prerequisite to the affirmative duty for qualifying for a special tax benefit, compares favorably with the oaths *upheld* in the following cases:

Cases and Citation.	Form of Oath.	Effect of Failure to Take Oath.
American Communications Association v. Douds, supra, 339 U.S. 382.	Non-membership and non-affiliation with Communist Party or other organization believing in or teaching violent overthrow; also non-belief (the non-belief provision was upheld by an equally divided court–the former, however, were sustained by five out of the six justices. See *Osman v. Douds,* 339 U.S. 846, where seven out of eight justices sustained former provisions).	Deprival of right to work as labor leader in union in interstate commerce; deprival of right of union to utilize National Labor Relations Board if it chooses or retains such an officer.
Gerende v. Board of Supervisors, 341 U.S. 56, aff'g Court of Appeals of Md. 197 Md. 282, 78 A. 2d 660.	Not a "subversive person"–"subversive person" defined as one who commits, attempts, aids, advocates, advises or teaches overthrow, destruction or alteration of the constitutional form of federal or state government by revolution, force, or violence, or who is a member of a "subversive organization"—upheld by United States Supreme Court as a valid regulation banning the candidacy of one "engaged 'in one way or another in the attempt to overthrow the government *by force* or *violence'* " or a member of such an organization with knowledge of its character.[2]	Deprivation of right to be a candidate for or hold public office and of the right of voters to vote for such person.
Shub v. Simpson, 196 Md. 177, 76 A. 2d 332 (Court of Appeals of Md.), appeal dis. as moot, 340 U.S. 881, after denial of motion to advance hearing to date before election, 340 U.S. 861, 873.	Same oath.	Same result.

[2]We read the broad language of the Supreme Court that the oath applies to those engaged "in one way or another" in attempted overthrow to cover those who directly advocate such overthrow since, most certainly, they can be considered participants in such an attempt as so defined.

Cases and Citation.	Form of Oath.	Effect of Failure to Take Oath.
Garner v. Board of Public Works, supra, 341 U.S. 716, aff'g 98 Cal. App. 2d 493 (hearing by Calif. Supreme Court den.).	Non-advocacy ("do not advise, advocate or teach") of violent overthrow in present and also *in past* for five years prior to date of city ordinance; non-membership in and non-affiliation with like organization, in present and for the past period.	Loss of right to qualify for *elected* or appointed office or position; removal of privilege of occupying present office or position. (The 17 nonsigners were discharged from their positions.)
Pockman v. Leonard, 39 Cal. 2d 676, appeal dismissed for want of a substantial federal question, 345 U.S. 962.	Non-advocacy of and non-membership in party or organization advocating overthrow of government "by force, violence or other unlawful means;" disclosure of advocacy and membership for past five year period. (Levering Act)	Loss of privilege of teaching in State College together with revocation of permanent teacher's tenure.
Hirschman v. County of Los Angeles, 39 Cal. 2d 698, cert. denied as *Petherbridge v. Los Angeles County,* 345 U.S. 1002.	Non-advocacy of and non-membership in any political party or organization advocating overthrow by force or violence.	Loss of privilege of permanent civil service status and dismissal from county employment.
Steiner v. Darby, 88 Cal. App. 2d 481 (hearing by Calif. Supreme Court den.), cert. granted as *Parker v. County of Los Angeles,* 337 U.S. 929, and dis., 338 U.S. 327, on ground constitutional questions "were not ripe for decision."	Same oath.	Fact-finding program upheld as basis for qualification of present and future county officers and employees.
Davis v. Beason, 133 U.S. 333 (cited with approval in *American Communications Association v. Douds, supra,* 339 U.S. at 398)	Non-advocacy of and non-membership in organization advocating bigamy or polygamy.	Denial of right to vote in territorial elections.
In re Summers, 325 U.S. 561.	Oath of allegiance and to support Constitution of state (Illinois).	Denial of privilege of practicing law to conscientious objector on religious grounds, who would not bear arms in defense of state.
In re Anastaplo (Supreme Ct., Ill.), 3 Ill. 2d 471, 121 N.E. 2d 826, appeal dis. for want of a substantial federal question and cert. denied, 348 U.S. 946.	Oath to support the Constitution of the United States and Constitution of the State of Illinois.	Attorney applicant denied privilege of admission to bar on ground he could not take such oath in good conscience when refused to inform bar committee as to membership in subversive organizations and stated belief in forcible overthrow of government.

Although we recognize that constitutional questions are determined more subtly than by mere massing of precedents, we cannot help observing that appellants do not cite one case that holds an oath invalid when same has been based upon a personal pledge of present non-advocacy of forcible overthrow of the government. Appellants cite, as invalidating oath requirements, only *Danskin v. San Diego Unified School District, supra, Wieman v. Updegraff,* 344 U.S. 183, and the Gwinn Amendment (public housing oath) cases.

The *Danskin* case, to the extent it is not superseded by the decision of the California Supreme Court in these causes, has already been distinguished as inhibiting permissible speech on the part of all members of a collective group—obviously not this situation.

The oath involved in *Wieman* extended to membership without requiring personal knowledge of the character of the subversive organization.[3] But when inquiry has been directed to that membership which is not without such knowledge, such inquiry has been upheld without hesitancy. *(Garner v. Board of Public Works,* 341 U.S. at 723-724; *Steinmetz v. California State Board of Education, supra; Adler v. Board of Education,* 342 U.S. 485; *Adler v. Wilson,* 203 Misc. 456, 123 N.Y.S. 2d 806 at 810.) In the case at bar, no such issue is presented since this oath does not extend to membership or affiliation; necessarily, knowledge

[3]The *Wieman* oath required all state officers and employees to swear that they were not "affiliated directly or indirectly" with any organization determined by the Attorney General or other authorized agency of the United States to be a "communist front or subversive organization." 344 U.S. at 186.

of the character of one's own action is to be presumed from the act of his personal advocacy. *Dennis v. United States, supra,* 341 U.S. at 499.

Appellants also rely on cases concerning the Gwinn Amendment. (66 Stat. 403, 42 U.S.C. §1411c.) These cases involved declaration requirements which broadly intruded into the field of an individual's membership and affiliation in prescribed organizations.

See:

Rudder v. United States, 226 F. 2d 51, 53, 54;

Kutcher v. Housing Authority of Newark, 20 N.J. 181, 119 A. 2d 1, at 4;

Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 122 N.E. 2d 522;

Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W. 2d 605, cert. den. 350 U.S. 882;

Housing Authority of Los Angeles v. Cordova, 130 Cal. App. 2d Supp. 883, 884, cert. den. 350 U.S. 969.

Not only did these cases involve a different public purpose that was clearly expressed in the Federal statutes concerned, but the *Rudder, Cordova* and *Kutcher* cases all expressly make an exception of situations where tenants of Housing Projects are sought to be evicted because engaged in advocating violent overthrow or subversion.

Moreover, appellants ignore the large body of state authority which by forms of oath and regulations analogous to that at bar, have upheld renunciation of present advocacy of destruction of the Government

as a condition to the receipt of appropriate civil benefits, as related to the particular state policy thereby determined.

Huntamer v. Coe, (Supreme Court, Washington) 40 Wash. 2d 767, 246 P. 2d 489 (oath—elected officials);

Fitzgerald v. City of Philadelphia (Supreme Court, Pa.) 376 Pa. 379, 102 A. 2d 887 (oath—dismissal of staff nurse in city hospital);

Pickus v. Board of Education of the City of Chicago (Supreme Court, Illinois), 9 Ill. 2d 599, 138 N.E. 2d 532 (oath—dismissal of teacher);

State v. Diez (Supreme Court, Fla.) 97 So. 2d 105 (oath requirement held valid for employment with state racing commission);

Communist Party v. Peek, 20 Cal. 2d 536, 127 P. 2d 889 (denial of participation in primary election to party advocating or teaching forcible overthrow);

Steinmetz v. Board of Education, 44 Cal. 2d 816, 285 P. 2d 617, cert. den. 351 U.S. 915 (dismissal of state college professor for failure to answer before Board re subversive affiliations);

Board of Education v. Cooper, (District Court of Appeal, California) 136 Cal. App. 2d 513, 289 P. 2d 80 (dismissal of teacher—failure to reply as to "present personal advocacy");

Appeal of Albert (Supreme Court, Pa.) 372 Pa. 13, 92 A. 2d 663 (dismissal of teacher involved in advocacy and subversion);

Milasinovich v. Serbian Progressive Club (Supreme Court, Pa.), 369 Pa. 26, 84 A. 2d 571 (corporate charter revoked for advocacy of overthrow of government);

Davis v. University of Kansas, 129 F. Supp. 716, 718 (dismissal of professor for failure to answer as to subversive affiliation and activity);

In re Anastaplo, supra, appeal dis. for want of a substantial federal question, *supra* (denial of admission to bar applicant who refused to answer as to affiliations and stated belief in forcible overthrow);

Cf. *Konigsberg v. State Bar of California,* 353 U.S. 252, at 271 (where it was expressly determined that the bar applicant not only did not and had not advocated violent overthrow but had testified under oath to and previously stated disavowal of and active opposition to advocacy of force and violence.)

Appellants' references to other free speech cases do not assist them since such cases, like those above, concerned the indiscriminate imposition of regulations interfering with *peaceable* speech, assembly or religious activity. Thus in *Thornhill v. Alabama,* 310 U.S. 88, the ordinance forbade peaceful as well as violent picketing; in *Thomas v. Collins,* 323 U.S. 516, registration was required of a union organizer for peaceable solicitation; in *De Jonge v. Oregon,* 299 U.S. 353, peaceable assembly for a lawful purpose as a forum for permissible speech was arbitrarily precluded;

West Virginia State Board of Education v. Barnette, 319 U.S. 624, involved the invalidity of requiring a flag salute as a prerequisite to school attendance—an affirmative act the failure to perform which involved no such consequences to the security of our government as the anti-social conduct with which we are concerned at bar; and *Hannegan v. Esquire, Inc.*, 327 U.S. 146, involved no more than the usurpation of administrative authority to classify and cut off the communication of speech. We have no quarrel with the importance or validity of these holdings, except to say that none apply here.

It would be a great disservice to the legitimate protection of American civil liberties to fail to delineate between prohibitions of legitimate speech and regulation, such as that now at bar, which is directed specifically to that very type of speech which is properly subject to state control. Any long-range protection of American civil liberties must draw a line which recognizes the propriety of regulation in those limited situations where regulation is permissible, as by the requirement of a narrowly drawn form of oath and affirmation applied only to the receipt of special civil benefits by those who would otherwise be deemed inappropriate to receive them. On this basis, there can be no denial of free speech to a veteran who fails to qualify for a special benefit in the form of tax exemption by failure to subscribe an oath or affirmation that he is not advocating violent overthrow of government, which has provided the subsidy as a reward for that very patriotism which the recipient chooses to abnegate. As so drawn, such requirement

is not directed to any mere discussion or criticism of government but is directed solely to that present advocacy of its forcible overthrow which has been held a proper subject of state regulation.

2. The Speech to Be Regulated Works a Clear and Present Danger of Substantive Evil.

We shall next show the extent of the evil and the substantiality of the public interest protected therefrom. We are in frank disagreement with appellants' statements (Brief, p. 43) that the present situation presents so insubstantial a public interest as to be outside the scope of the *Douds* rule. If the public interest here, by reason of the limited application of the veterans' property tax exemption, is less vital than the protection of interstate commerce, which we would by no means concede, so much more limited also is the effect of this oath. Whereas in the *Douds* case (and others we have cited), those affected were deprived of their very livelihood and organizations were deprived of their leaders, if the latter were not indeed criminally convicted and incarcerated, as in the *Dennis* case, the present oath works only as the qualification for a tax advantage and in doing so affects only that small area of speech which incites violence dedicated to the overthrow of our government. In determining under the *Douds* rule whether this "indirect, conditional, partial abridgment of speech" is valid, appellants totally ignore the above factors which must be considered in balancing the value of the speech against the importance of the interests which we are now to discuss.

Although respondents have contended that there is no need for a showing of clear and present danger to justify the limited non-penal standard of qualification for benefits at issue, it is also their position, in the alternative, that there is sufficient support for the legislative determination of existence of the requisite peril to a protectible interest of society. In making such contention, we do not intend to abandon our prior position, in part III of this brief, that clear and present danger is not the proper test to be applied to a non-penal regulation of criminal incitement.

Contrary to the appellants' assertion, there is no requirement that the legislature hold hearings or make findings therefrom as the prerequisite to valid legislation. When members of the general public, even those with special interests (i.e., property owners) are to be affected by general legislation, they need not be given a hearing for they are presumed to have been heard through their representatives in the legislature.

Bi-Metallic Invest. Co. v. State Board of Equalization, 239 U.S. 411;

In re Orosi Public Utility District, 196 Cal. 43, 50.

There need be no long recital of those facts which render the present time of peace as dangerous, if not more dangerous, to the civil liberties of this nation than most if not all the wars of our past history.[4] As this court stated in discussing the views of Justices Holmes and Brandeis in the *Gitlow* case, "they were

[4]As J. Edgar Hoover has stated: "Never has there been a time when we have so much need for one another." Masters of Deceit (Henry Holt & Co., 1958) Foreword, p. viii.

not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government in the context of world crisis after crisis."

Dennis v. U.S., supra, 341 U.S. at 510.

Also see:

Harisiades v. Shaughnessy, supra.

That Communism presents the requisite clear and present danger of imminent substantial evil has been established by and in a manner satisfactory to the courts. In *Dennis v. United States, supra,* Judge Medina's charge to the jury that the Communists' violation of the Smith Act offered sufficient danger of a substantive evil that the Congress had a right to prevent was upheld as being a proper subject of judicial notice; in his concurring opinion in the *Douds* case Justice Jackson elaborated at length upon the discipline and undeviating nature of the Communist conspiracy. (339 U.S. at 422-433.)

Further, since a legislative declaration may be of aid in confirming the legitimate purpose of such legislation and is deserving of judicial deference in preserving the policy so implemented (*American Communications Assoc. v. Douds, supra*) the following California and federal statutes should be noted as finding the requisite danger in advocacy of the violent overthrow of the government and support of its enemies:

1. Government Code Section 1027.5—a complete finding of objectives and tactics, concluding that

> "There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California . . ."

Also see Government Code § 1028 (covering advocacy of violent overthrow along with membership in Communist Party or other organization which advocates violent overthrow as a sufficient cause for dismissal of public employees) and see Education Code § 8275 (defining Communism as a theory for forcible overthrow and prohibiting advocacy in public schools).

2. The Subversive Organization Registration Law, Cal. Corp. Code §§ 35000-35302, particularly section 35001.

3. The Internal Security Act of 1950 (federal), Sept. 23, 1950, c. 1024, Title I, sec. 2, 64 Stat. 987, 50 U.S.C. sec. 781. (See *Galvan v. Press,* 347 U.S. 522, 529, reading the findings of the Internal Security Act of 1950 into the Immigration and Nationality Act.)

4. The Communist Control Act of 1954 (also federal), Aug. 24, 1954, c. 886, 68 Stat. 775.

5. Also see the Smith Act, *supra.*

6. 67 Stat. 134, 18 U.S.C. § 2391 (June 30, 1953), (extending effect of federal sedition statute beyond wartime).

Respondents in this case do not for one moment contend or admit that the oath required under Section 32 of the Revenue & Taxation Code applies only to persons formally connected with the Communist conspiracy. It is our purpose in this discussion to show that that conspiracy has been found to constitute *attempted* overthrow (see *Dennis v. United States, supra*) or other harmful subversive activity a real and substantial danger. It is not that our basic freedoms rate any lower in the scale of values; it is that our security must need occupy a relatively higher place on that scale than heretofore. *American Communications Association v. Douds, supra,* at 394; *Dennis v. United States, supra,* 341 U.S. at 510; *Steinmetz v. California State Board of Education, supra,* (distinguishing *Communist Party v. Peek,* 20 Cal. 2d 536, 127 P. 2d 889, in reference to recognition of the subversive character of the Communist Party "under the conditions then existing"):

3. **The Oath Protects a Substantial Public Interest.**

Plaintiff, however, makes inquiry as to how or in what manner the security of the nation will be aided by picking out veterans as a class and imposing on them prerequisites for certain benefits. There are two answers to this query.

The first is that veterans are citizens and that it is the duty of every citizen to refrain from criminal and

disloyal acts bordering on treason.[5] As citizens applying for special benefits above and beyond those available to the mass of the citizenry, veterans can be properly required and should rejoice in the opportunity to state that they are not attempting to destroy the nation for which they once fought.

Another important function of a declaration of this kind is in securing information as to those who may be subversive. Such information, it must be conceded, is of value in enabling the Legislature to observe the workings of the tax exemption program, as an instrument for the inculcation of patriotism and as part of the state program against violent subversion. Such information is as relevant for such state purposes as similar information which can be secured from public employees.

See: *Board of Education v. Eisenberg,* 129 Cal. App. 2d at 732, 742, 277 P. 2d 943, at 950, quoting from *United States v. Josephson,* 165 F. 2d 82, 333 U.S. 838:

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[5]Even the Federal Government deems continued loyalty relevant to the receipt of those veterans' benefits granted by it:

57 Stat. 555, 38 U.S.C.A. §728 (enacted July 13, 1943):

"Any person shown by evidence satisfactory to the Administrator of Veterans' Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future benefits under laws administered by the Veterans' Administration pertaining to gratuities for veterans and their dependents; Provided, however, That the Administrator of Veterans' Affairs, in his discretion, may apportion and pay any part of such benefits to the dependents of such person not exceeding the amount to which each dependent would be entitled if such person were dead."

> " 'The power of Congress to gather facts of the most intense public concern, such as these, is not diminished by the unchallenged right of individuals to speak their minds within lawful limits. When speech or propaganda, or whatever it may at the moment be called, clearly presents an immediate danger to national security, the protection of the First Amendment ceases.' "

See *Garner v. Board of Public Works, supra,* 341 U.S. at 720; *Steinmetz v. California State Board of Education, supra; Fitzgerald v. City of Philadelphia, supra,* 102 A. 2d 887, 890; *Adler v. Wilson, supra,* 123 N.Y.S. 2d at 809-810.

Unnecessary attacks against abuses of government power which are not present in this case, should not obscure the fact that patriotism remains a virtue in our society that is not merely to be taken for granted but which is worthy of being affirmatively inculcated.[6] Appellants obscure the fact that proper steps within the permissible scope even of regulation of constitutional rights may be taken to promote patriotism. The possibility of abuses not yet shown is insufficient to vitiate the right of state action validly regulating constitutional rights "While this Court sits". (*Beauharnais v. Illinois, supra,* 343 U.S. at 263. Such possibility does not invalidate the state enactments at bar.

United States v. Harriss, supra.

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[6] "And we must never forget that if our government is to remain free, it needs the help of every patriotic man, woman and child." J. Edgar Hoover, op. cit., supra, p. viii.

In *Gilbert v. Minnesota,* 254 U.S. 325, cited in *Pennsylania v. Nelson,* 350 U.S. 499, 500-501, it was clearly held that there is a proper scope for state action which is even pointed directly to the promotion of patriotism.

> ". . . The United States is composed of the states, the states are constituted of the citizens of the United States, who also are citizens of the states, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the states as well as the United States are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them,—whether it is repellant and adverse or eager and militant,—and to maintain it eager and militant against attempts at its debasements in aid of the enemies of the United States is a service of patriotism, and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt."

Cited in the *Gilbert* case is the case of *Halter v. Nebraska,* 205 U.S. 34,

> ". . . To maintain and reverence these, to 'encourage patriotism and love of country among its people,' may be affirmed, it was said, to be a duty that rests upon each state; and that 'when, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling toward the state."

As the *Gilbert* case concluded, a state "has power to regulate the conduct of those citizens, and to re-

strain the exertion of baleful influences against the promptings of patriotic duty, to the detriment of the welfare of the nation and state." (254 U.S. at 331.)

The reason why such an oath can be required of veterans is that it subsidizes those who have set an example of loyal service devoted to the cause of their country. As a subsidy for and tribute to patriotism it may be conditioned to exclude those whose conduct does not comport with standards applicable to all citizens similarly situated set by the legislature to discourage conduct seeking the overthrow of the government. It is not a valid argument to rely upon the Supreme Court cases dealing with oath requirements for public officers and employees and labor union officials and to state that these exhaust the legislative power to provide such safeguards. Indeed, just because respondents have a quarrel with the wisdom of the particular oath requirement there is no reason to ignore the determination of the legislature and the people that a serious evil would be combated by such measure. No other body is in a position to substitute its judgment as to the "necessity or desirability" of the statute for that of the state as the legislating power.

American Communications Association v. Douds, supra, 339 U.S. at 400-401.

The Supreme Court of California in its opinion in the cases at bar clearly related the loyalty declaration requirement here at issue to the importance to the state purpose of patriotism which is served. Also see *Veterans Welfare Board v. Riley,* 188 Cal. 607,

206 Pac. 631; *Allied Architects' Assn. v. Payne,* 192 Cal. 431, 221 Pac. 209.

Nor is it an argument against the oath that it is useless because it may be violated. Just because some might be reprehensible enough to take the oath and the benefit and at the same time to work the destruction of their benefactor is no reason to doubt the legislative judgment, even were legislative wisdom subject to attack, which it is not.

Nor can appellant complain of the limited impact of the program as covering only those veterans with property less than the maximum allowed by the exemption, since it is the *subsidizing* of active subversion by the state that is the evil sought to be met by the legislation. *Hamilton v. University of California,* 293 U.S. 245, upheld the requirement of military training for pacifist students in land grant colleges on the ground that benefits could be reasonably conditioned on training for patriotic service, despite contention that freedom of religion was thereby violated. In concurring in the main opinion, Justices Cardozo, Brandeis and Stone said of these students:

> "'If they elect to resort to an institution for higher education maintained with the state's moneys, then and only then they are commanded to follow courses of instruction believed by the state to be vital to its welfare.'" 293 U.S. at 266.

Indeed, it may well be asked if active military training can be required of a pacifist as a condition of receiving a state-financed education (*Hamilton v. University of California, supra*) and if the obligation of

bearing arms for a state can be imposed as a condition for admission to the bar (*In re Summers, supra*), why the much less rigorous condition of refraining from incitement of forcible overthrow of the government cannot be demanded by it as a condition to a voluntary tax benefit which it offers for the very patriotic purposes which a seeker of its overthrow would derogate? Indeed, as the very advocate of violent overthrow can be compelled to undergo military training and service as prerequisite to far more valuable benefits, is it any more inconsistent with his supposed ideals[7] to have to refrain from opposing that to which he could otherwise be compelled to give active support. As the Illinois Supreme Court stated in *In re Anastaplo, supra,* 121 N.E. 2d at 832, in discussing the effect of the *Summers* case on this problem:

> "We see no substantial difference, or basis for a different application of the limitations on the right of free speech, between an inquiry into Summer's belief that he would not bear arms in support of his government and an inquiry, where the existence of a clear and present danger is

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[7]Justice Cardozo, in the Concurring Opinion in *Hamilton v. University of California, supra,* stated in regard to such a situation:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law." 293 U.S. at 268.

known, directed to petitioner's membership in an organization which advocates the overthrow of the same government by force of arms if necessary. Measured by popular belief and opinion, we think that one who would embrace a movement to overthrow our government by force of arms is relatively more unqualified to fulfill his obligations as a lawyer than is a person who, because of conscientious scruples, would not use force of arms to prevent wrong. The latter admits of some loyalty to his government, the former none."

See *American Communications Assn. v. Douds,* 339 U.S. at 405 (approving and applying *Summers* holding).

Appellants strive to broaden the present controversy to extend to categories of persons and entities not involved in this law suit. They seek to extend this controversy to those who have not challenged the tax provisions here in question and to whom the tax provisions have not been shown to have been applied. In seeking to involve growing crops, fruit, and nut-bearing trees, and cemeteries, as well as income tax and other personal exemptions in this litigation, appellants ignore well-established rules of tax litigation and of constitutional adjudication.

In the first place they ignore the clear provisions of California Revenue and Taxation Code Section 26:

"If any provision of this code, or its application to any person or circumstance, is held invalid, the remainder of the Code, or the application of the provision to other persons or circumstances, is not affected."

The doctrine of severability, particularly as to provisions not yet applied, is of course recognizable in federal as well as state law. See *United States v. Harriss, supra,* 347 U.S. at 627.

Further ignored is applicable state law that a challenge to a tax measure may only be made by the person to whom the particular tax is applied, and under the particular section of the law under which the tax is imposed.

County of Los Angeles v. Eikenberry, 131 Cal. 461, 63 Pac. 766;

People v. Globe Grain & Mill. Co., 211 Cal. 121, 294 Pac. 3;

In re Halck, 215 Cal. 500, 11 P.2d 389;

Platt v. Philbrick, 8 Cal.App. 2d 27, 47 P. 2d 302;

In re Durand, 6 Cal.App. 2d 69, 44 P. 2d 367.

In view of the fact that the particular property tax involved is governed by California Revenue and Taxation Code Section 32 unlike many of the other California taxes cited by appellants, and for the reason that those challenging the oath in this case are veterans claiming under a specific constitutional provision awarding the so-called "Veteran's Exemption," other real or imagined applications of the tax law were not before the California Supreme Court. Moreover, in view of the code section above cited, it is our contention that under state law each application of the anti-advocacy requirement of the California Constitution, whether by oath or by some other means not presented in the case at bar, must be tested separately

according to its own particular facts, particularly "when the statute, has not been, and might never be, applied in such manner as to raise the question".

United States v. Petrillo, supra, 332 U.S. at 11.

As this Court has long held, it will not decide constitutional matters in the absence of the necessity for the same, or on hypothetical facts.

Peters v. Hobby, 349 U.S. 331, 338.

As this Court further stated in *Rescue Army v. Municipal Court,* 331 U.S. 549, 569, constitutional questions will not be determined "in broader terms than are required by the precise facts to which the ruling is to be applied" or "at the insistence of one who fails to show that he is injured by the statute's operation." Also see *United States v. Petrillo, supra; Alabama State Federation of Labor v. McAdory,* 325 U.S. 450. In the case at bar, appellants are in nowise injured by any application of the constitutional provisions or statute in question to other taxpayers.

V.

THE TERMS OF THE CONSTITUTIONAL AMENDMENT AND OATH FURNISH A DEFINITE STANDARD SATISFYING IN ALL RESPECTS THE DEMANDS OF DUE PROCESS.

A. The Declaration Requirement Is Not Void for Vagueness.

Appellants claim the provision and oath requirements are void for vagueness and permit doubt as to whether an applicant should subscribe to the oath and as to whether a person would be sufficiently

protected in the event of criminal prosecution for improperly taking such oath.

The following authorities unequivocally support the wording of this oath as being sufficient notice of the conduct proscribed:

Dennis v. United States, supra, 341 U.S. at 515, answered such contention:

> "This argument is particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit. . . .
>
> ". . . Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the statute."

Accord:

American Communications Association v. Douds, supra, 339 U.S. at 412-413 (oath upheld except as to provisions concerning belief);

Adler v. Board of Education, supra, 342 U.S. at 496 ("subversive" sufficiently defined as advocacy of forcible overthrow);

Pockman v. Leonard, supra (upholding similar oath—advocacy or membership in organiza-

tion advocating overthrow "by force or violence or *other unlawful* means" (italics added));

Hirschman v. County of Los Angeles, supra;

Fitzgerald v. City of Philadelphia, supra, 376 Pa. 379, 102 A. 2d 887, see at 890.

Also see:

Whitney v. California, supra, 274 U.S. at p. 366;

Shub v. Simpson, 196 Md. 177, 76 A. 2d 332, 337-338.

Likewise the argument of appellants as to the invalidity of that part of the oath involving present advocacy of the support of a foreign government in a future war also falls under the above cases.

We contend that advocacy, as an accepted concept of action by the way of support of a foreign government in the future contingency of war between it and the United States, is subject to regulation as a form of advocacy of forcible overthrow. See *Dennis v. United States, supra,* and *Yates v. United States, supra,* 354 U.S. at 320, that advocacy of "*future* violent action" is enough.

The California Supreme Court similarly held that such conduct would frustrate the state's program of tax exemption. It is noteworthy that even the privileges of law practice and of a university education have been denied for failure to take an oath of allegiance and support of federal and state governments and to engage in compulsory military training.

In re Summers, supra.

Also see:

In re Anastaplo (Supreme Court, Illinois), *supra* (appeal dismissed for want of a substantial federal question and cert. den., 348 U.S. 946);

Hamilton v. Regents of the University of California, supra.

Likewise, when appellants contend that the language dealing with support of a foreign government, is judicially unconstrued, they ignore those authorities which upheld Section 3 of the Espionage Act of 1917 (Act of June 15, 1917, c. 30, 40 Stat. 217, as amended by Act May 16, 1918, c. 75, §1, 40 Stat. 553) which imposed penal sanctions on "Whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein. . . ."

Lockhart v. United States, 264 Fed. 14, cert. den. 254 U.S. 645;

Wimmer v. United States, 264 Fed. 11, cert. den. 253 U.S. 494.

See also, upholding the Espionage Act of 1917, in its entirety:

Frohwerk v. United States, 249 U.S. 204;

Debs v. United States, 249 U.S. 211;

Abrams v. United States, 250 U.S. 616;

United States v. Burleson, 255 U.S. 407.

Particularly applicable is *Gilbert v. Minnesota, supra,* where a state provision that its citizens "not aid or assist in prosecuting or carrying on war with the public enemies of the United States" was upheld

as a valid state regulation designed to encourage patriotism. 254 U.S. at 327, 330-331.

In a time of present danger as grave as any war in the Nation's history, no distinction can be conceived between a wartime situation and that of the present emergency. Under such circumstances the rule of the *Dennis* case "that advocacy of violent action to be taken at some future time was enough" is applicable to sustain the present oath requirement.

Dennis v. United States, supra, 341 U.S. at 507.

See:

Yates v. United States, supra (reaffirming said principle).

Moreover, in view of the fact of prior judicial definition of the words "support" and "hostilities", there can be no just claim that the terms in question are unconstitutionally vague.

United States v. Schulze, 253 Fed. 377, 379-380, aff'd as *Schulze v. United States,* 259 Fed. 189 (definition of "support");

Schoborg v. United States, 264 Fed. 1, at 5 (same);

Samuels v. United Seaman's Service, Inc., 165 F. 2d 409, 411-412 (definition of hostilities as "open and hostile warfare activity");

Burger v. Employees' Retirement System, 101 Cal. App. 2d 700, 702, 226 P. 2d 38 (definition of "hostilities"; accord).

See also:

Kaiser v. Hopkins, 6 Cal. 2d 537, 58 P. 2d 1278 (definition of "war" for purpose of veterans' property tax exemption as active conduct of hostilities).

In view of the extensive judicial construction of the terms of this oath requirement, it fully satisfies the criterion of fair notice and escapes the vice of being void for vagueness or of including any type of speech or conduct which is not properly subject to regulation.

U. S. v. Harriss, supra, 347 U.S. at 617-618;

Beauharnais v. Illinois, supra, 343 U.S. at 264;

Cole v. Arkansas, 338 U.S. 345, 354 (upholding state statute directed against promotion of assemblage to prevent by force or violence a person from engaging in a lawful location);

U. S. v. Petrillo, supra, 332 U.S. at 7;

Chaplinsky v. State of New Hampshire, 315 U.S. 568, 574 ("A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.");

U. S. v. Ragen, 314 U.S. 513, 523;

Gorin v. U. S., 312 U.S. 19, 28.

B. The Declaration Requirement Does Not Deny Procedural Due Process.

When appellants contend that Section 32 deprives them of their tax exemption on a fallacious inference, they are guilty of two grave misconceptions.

First, they falsely assume that an oath declaration of non-advocacy cannot be required as proof of the loyalty of a person, who by the status he occupies or claims, has placed himself in a position where he is properly subject to such inquiry. In the second place, appellants misconstrue the burden of proof needed to obtain such privilege; they complain of the inferences drawn against them, in disregard of the necessity that one must prove himself entitled to obtain the exemption by the substantive terms of the Constitution under the procedure outlined in the statute.

The first misconception was dealt with by this Court as to a broader form of oath, in *Garner v. Board of Public Works of Los Angeles, supra,* 341 U.S. at 720, where it was held, "The affidavit requirement is valid." As it was stated in *American Communications Assn. v. Douds, supra,* 339 U.S. at 414, an oath directed to present and not to past conduct or loyalty is not a religious test oath and the casting of such provision in oath form "hardly rises to the stature of a constitutional question."[8]

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[8]See *Huntamer v. Coe; supra,* 246 P. 2d at 492, tracing the history of the proper use of oaths of allegiance (in which category it holds a non-advocacy oath to fall) and the abuse of such oaths, which it notes have taken the form of tests of religious belief or of *past* conduct, usually involving past political beliefs or activities. The Court pointed out that, outside of such abuses,

> "Oaths of office and oaths of allegiance have been of tremendous importance in the organization and functioning of society since very ancient times." 246 P. 2d at 492.

Also see:

Gerende v. Board of Supervisors, supra;
Davis v. Beason, supra;
Mallinckrodt Chemical Works v. Missouri, 238 U.S. 41.

Hence the fact that a declaration by oath or affirmation[9] is utilized as the method of qualifiation for veterans' tax exemption does not invalidate the qualification requirement; the scope for the employment of a valid state procedure is for the state to determine.

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 472.

In the second place, appellants assume that they have an automatic right to the privilege, when the truth is that they, as taxpayers under state law, have the affirmative burden of proof, in Court as well as before the Assessor.

Chesney v. Byram, supra, 15 Cal. 2d 460, at 465, 101 P. 2d 1106 ("It is obvious that the burden should be upon the person claiming the exemption to establish his right thereto");
Cal. Revenue and Taxation Code § 26 (Waiver by failure to follow required procedure).

Thus, it is their burden to show that they are proper persons to qualify under the self-executing constitutional provision for the tax exemption in question—i.e., that they are not persons who advocate the over-

[9]California Revenue and Taxation Code, §17 provides: "'Oath includes affirmation.'" There is an option in California to substitute an affirmation or declaration for an oath. Cal. Code of Civil Procedure §2097.

throw of the government of the United States or the State by force or violence or other unlawful means or who advocate the support of a foreign government against the United States in the event of hostilities. Thus it is of small benefit to appellants to talk of adverse inferences, when the burden is on *them* to produce evidence justifying their claim of exemption. It is not a matter of drawing adverse inferences; it is rather a matter of there being no evidence at all.

This principle is all the more applicable to the initial qualification for a privilege, where, unlike a revocation, the burden of proof is on the person qualifying. See *In re Anastaplo, supra.* (Note that this Court dismissed an appeal from this judgment as lacking a substantial federal question, *supra.*)

Insofar as appellants are seeking to infer that the oath requirement is a bill of attainder (such a claim was resolved against appellants by the trial Court and has apparently been abandoned on this appeal), it is hardly necessary to add that *Cummings v. Missouri,* 4 Wall. (U.S.) 277, 18 L.Ed. 356, relied upon by appellants, has repeatedly been distinguished as dealing with legislative revocation of privileges as a punishment for *past acts* committed *before* the effective date of the oath requirement. A host of authorities support this construction of the operation of the Bill of Attainder clause.

American Communications Association v. Douds, supra, 339 U.S. at 413-414;

Garner v. Board of Public Works, supra, 341 U.S. at 722;

Shub v. Simpson, supra.

In this connection we have observed the decision in *Slochower v. New York*, 350 U.S. 551 and note that this Court reaffirmed its earlier holdings in *Adler v. Board of Education, supra*, and *Garner v. Board of Public Works, supra*, in recognizing the right of a city itself through its own governmental agencies to inquire into the qualifications of its own employees and other governmental matters.

See also:

Steinmetz v. Board of Education, supra.

In the case at bar, we would observe that it was the consequence of a failure to make the affirmative showing required as a prerequisite to tax exemption before the Assessor, as the very officer charged with administrative and quasi-judicial duties of determining exemptions from county property taxation, that resulted in the denial of the veteran's exemption.

VI.

THE SELECTION BY A STATE OF CERTAIN OBJECTS FOR THE RECEIPT OF A SUBSIDY IN THE FORM OF TAX EXEMPTION DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION AND RAISES NO FEDERAL QUESTION WITHIN THE COGNIZANCE OF THIS COURT.

The determination by a state of the particular objects worthy to receive tax exemptions and the conditions for qualification for said exemptions are matters properly reserved to the jurisdiction of the

several states. Moreover, appellants seek to overturn the construction given by the California Supreme Court to state law, when they contend that the California Legislature improperly created exceptions to the operation of California constitutional provisions. Such a contention does not present a Federal question. Interpretation by a state of its own statutes as being in harmony with its constitutional provisions presents no question appropriate for adjudication before this Court.

> *City of Opelika v. Opelika Sewer Co.*, 265 U.S. 215, 217-218 (Whether ordinance was valid under laws of state belongs to the Supreme Court of the state to decide);
>
> *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 107.

Even were appellants authorized to raise the question of the application of Section 32 of the Revenue and Taxation Code to other taxpayers who are not at bar, it is well established that a state has broad rights of selection and classification in regard to the objects of state taxation.

> *Leigh v. Green*, 193 U.S. 79, 86, 89. ("The state has a right to adopt its own method of collecting its taxes, which can only be interfered with by Federal authority when 'necessary for the protection of rights guaranteed by the Federal Constitution.'")

Selecting and classifying objects for the utilization of an oath or affirmation as the means for qualifying for tax exemption is fully within the powers of the

state and such classification would not violate equal protection, particularly where the members of each class are treated equally.

Skiriotes v. Florida, 313 U.S. 69, 75;
Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 556;
U. S. v. Petrillo, supra, 332 U.S. at 8;
Alabama State Federation of Labor v. McAdory, supra, 325 U.S. at 472.

See, particularly,

Mallinckrodt Chemical Works v. Missouri, 238 U.S. 41, 55-56 (Upholding selective procedures requiring use of affidavit to qualify for continuation of benefits of incorporation).

Also, see, upholding classifications,

United States v. Burnison, 339 U.S. 87, 95;
International H. Co. v. Missouri, 234 U.S. 199;
Rast v. Van Deman & Lewis Co., 240 U.S. 342;
Lake Shore & M.S.R. Co. v. Clough, 242 U.S. 375;
State Board v. Jackson, 283 U.S. 527;
New York R.T. Co. v. New York City, 303 U.S. 573.

These arguments dispose of the contentions by appellants as to the exemption of householders and the failure to utilize the oath or affirmation procedure as to other classes of taxpayers. Moreover, due to the fact that other classes of taxpayers are not before this court, and many of said classes would necessarily qualify for tax exemption by means of other procedures, appellants can not properly assert constitu-

tional questions which could only properly be raised by such other taxpayers themselves.

Bode v. Barrett, 344 U.S. 583 (Persons not injured by classification not entitled to challenge same);

Alabama State Federation of Labor v. McAdory, supra, 325 U.S. at 463;

Skiriotes v. Florida, supra, 313 U.S. 69, 74;

Standard Stock Food Co. v. Wright, 225 U.S. 540;

Mallinckrodt Chemical Works v. Missouri, supra, 238 U.S. 41, 54 ("One who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him.").

In this connection particularly applicable is the holding of *U. S. v. Petrillo, supra,* 332 U.S. at 8, 11, that the prohibitions of a statute restricting First Amendment rights may be applied to a particular class and that hypothetical applications of such statute in other situations will not be considered.

The application of the constitutional provision and the statute on the question of aliens unduly occupies appellants' attention. Not only are there no aliens before this Court, but no allegation of any such discrimination was urged in the lower Courts. In such situation no proper Federal question is raised.

Edelman v. California, 344 U.S. 357;

Alabama State Federation of Labor v. McAdory, supra, 325 U.S. at 472.

In addition, appellants assume that aliens cannot properly be compelled to refrain from advocacy of overthrow of the government by force or violence, and other prejudicial acts. Appellants ignore the obligation of aliens, particularly resident aliens, to maintain a degree of loyalty to this country while living therein, even to the extent of military service. Appellants fail to consider applicable authorities and statutes imposing such obligations on aliens.

Harisiades v. Shaughnessy, supra, 342 U.S. at 587 (Upholding deportation of aliens for advocacy of forcible overthrow);

Carlson v. Landon, 342 U.S. 524, 535 (Noting long-standing statutory provision for deportation of aliens devoted to overthrow of the government by force and violence and extension of the same principle to communists).

See:

Leonhard v. Eley, 151 Fed. 2d 409.

The requirement that an alien owes minimum loyalty to this country (to the extent such question is involved in this case) is particularly applicable to any alien who is a veteran of the Armed Forces and who seeks a benefit inspired by and dedicated to that patriotic obligation which military service entails.

See:

U. S. v. Rumsa, 212 Fed. 2d 927, 932, Cert. den. 348 U.S. 838 (Military obligation of resident aliens).

VII.

CONGRESS HAS NOT INTENDED TO INVALIDATE STATE ENACTMENTS CONCERNING NON-CRIMINAL RESTRICTIONS ON SUBVERSIVE CONDUCT.

Appellants contend that the doctrine of *Pennsylvania v. Nelson,* 350 U.S. 497, abrogates the power of states to impose regulations of merely a civil nature on those who advocate forcible overthrow of the United States and state governments. So stated appellants' contention would destroy all enactments by the people of the several states designed for the protection of their respective institutions, such as declarations designed to prevent subversives from assuming public office or employment, from becoming teachers and from exercising other privileges and receiving benefits, such as this veterans' tax exemption.

The answer to such contention is plain. Congress has not intended such result, nor could Congress constitutionally effect such result as a legislative body with limited and delegated powers. Directly in point is *Davis v. Beason,* 133 U.S. 333, where this Court held that a federal election qualification statute did not supersede a territorial requirement of qualification by means of an oath covering advocacy of conduct similar to that federally regulated. (See at 348.)

The further answer is that neither did this Court intend such result in any expression made by it in the case of *Pennsylvania v. Nelson, supra.*

In the first place the intent of Congress is governing. See: *California v. Zook,* 336 U.S. 725, 733. The fact cannot be denied that *Pennsylvania v. Nelson,*

supra, was concerned with the effect of *criminal* sedition statutes, both Federal and state. A separate question is raised when the contention is made that Federal legislation supersedes state civil regulations. As the opinion of the California Supreme Court (R. 54-56) so clearly states, the only state legislation being considered by this Court is taken to be that limited to the imposition of criminal penalties—i.e., "parallel state legislation." (350 U.S. at 509.)

Under the tests prescribed by this Court in *Pennsylvania v. Nelson,* the three tests there prescribed for the supersession of state legislation are not met.

First, the scheme of Federal regulation is not so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.

Parker v. Brown, 317 U.S. 341.

Congress has not prescribed tests for state office-holding for employment by states or municipalities, for qualification of school teachers, or for the determination of the right of exemption from state and local taxes. Unlike the state "sedition" acts, which were comparable in purpose and scope to Federal criminal legislation, the end result of the above enumerated civil enactments is not punishment but the service of valid state purposes.

Union Brokerage Co. v. Jensen, 322 U.S. 202, 207-208, 212.

Second, the Federal interest is not so dominant in this field that it would preclude enforcement of state laws since there is no predominant Federal interest in determining the right to state office or employment,

or exemption from state tax laws, absent the violation of specific Federal constitutional guaranties.

Kotch v. River Port Pilot Commissioners, supra;

Michigan Central R. Co. v. Powers, 201 U.S. 245, 292-293 (no national supervision over state taxation);

Kirtland v. Hotchkiss, 100 U.S. 491.

Third, there is no danger of conflict between the enforcement of state civil regulations precribing forbearance of the advocacy of the violent overthrow of government and administration of the Federal Security Program.

Clark v. Allen, 331 U.S. 503, 516-517 (upholding state reciprocity as to alien inheritance);

Hamilton v. Regents, supra, 293 U.S. at 260.

Unlike the findings discussed in regard to the necessity for centralization of criminal prosecutions for sedition in *Pennsylvania v. Nelson, supra,* no such finding has been made as to any state civil regulations in the fields of combating subversion and determining qualification for state benefits; nor do appellants point to any such finding. Centralization in this field would be both unworkable and undesirable. The interest in *Pennsylvania v. Nelson,* as quoted by the court, was stated to be "that punitive sanctions for sedition against the United States be such as have been promulgated by the central governmental authority and administered under the supervision and review of that authority's judiciary." (350 U.S. at 508.) The limitation to "punitive sanctions" and the reference to

the Federal Judiciary are significant, since while there is Federal *criminal* jurisdiction in the field of subversion, no corresponding civil jurisdiction would exist to entertain the general run of litigation concerning qualification for the privileges of *state* employment and other civil benefits, including those at bar.

Thus, all three tests for Federal supersession fail.

Noteworthy in this respect is the case of *California v. Zook,* 336 U.S. 724, wherein the absence of any "clearly manifested" statutory expression of any such purpose or any other legislative history was held, even in spite of coordinate coverage of Federal and state criminal statutes, to render the doctrine of supersession inoperative, "In which, we would be setting aside great numbers of state statutes to satisfy a congressional purpose which would be only the product of this Court's imagination." (336 U.S. at 732-733.)

Also in the case at bar there is no intent on the part of Congress to *displace* local rules, since, unlike many sedition statutes, state civil loyalty enactments in many cases were enacted *after* the Smith Act. (Cf. *California v. Zook,* id. at 735.) Also, "according to familiar principles, Congress having occupied but a limited field, the authority of the state to protect its interests by additional or supplementary legislation otherwise valid, is not impaired."

Skiriotes v. Florida, supra, 313 U.S. at 75;
Alabama State Federation of Labor v. McAdory, supra, 325 U.S. at 467.

Also, see:

Gilbert v. Minnesota, supra,

distinguished but not overruled in

Pennsylvania v. Nelson, 350 U.S. at 500-501.

Another important consideration is that Congress could not validly legislate to occupy the field of state taxation and the granting of state tax exemptions. To do so would completely abridge the distinction between the delegated powers of Congress (U. S. Const. Art. I, sec. 8) and the reserved powers of the states (Ninth and Tenth Amendments).

See

Parker v. Brown, 317 U.S. 341, 359-360;

Bernhardt v. Polygraphic Co., 350 U.S. 198, 202;

United States v. Burnison, supra, 339 U.S. at 91-92.

Such a result would mean that Congress by the enactment of a criminal statute could terminate all state governmental power and the jurisdiction of all state courts in a particular field; such result would terminate our Federal system of government and would supplant in its stead a unitary national state with mere subordinate administrative units. Obviously, the Federal criminal enactments under consideration should not be interpreted so as to raise any such question.

Further consequence of the abrogation of the doctrine of supersession to the case at bar would be the

enforced reliance on criminal prosecution as virtually the exclusive method of controlling the problem of subversion.[10] Yet, it is well established that criminal prosecution due to its greater burden of proof and other restrictions which attend the imposition of criminal penalties is often insufficient. Even the United States Government itself often resorts to remedial civil actions instead of or even after criminal prosecutions. Cf. *Helvering v. Mitchell,* 303 U.S. 391, 397. To restrict state action to a bare reliance on the results of Federal criminal prosecutions in the Federal Courts would deny to the states that reserve power to take steps for their individual self-interest in a manner never intended by either the Founding Fathers nor the Congresses which enacted the Federal legislation which is asserted to supersede the state legislation at bar. No such construction should be given to the Smith Act and other Federal legislation in question, in the absence of a clear manifestation of Congressional intention.

Schwartz v. Texas, 344 U.S. 199;

Parker v. Brown, supra, 317 U.S. at 351;

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[10]It will be observed that state courts have determined the doctrine of supersession not to govern outside the field of criminal sedition.

State v. Diez, Fla., 97 So. 2d 105;

Wyman v. Uphaus, N.H., 130 Atl. 2d 278;

Hahn v. Wyman, N.H., 123 Atl. 2d 166.

But *cf. Albertson v. Millard,* 345 Mich. 519, 77 N.W. 2d 104 (comprehensive subversive control statute).

Penn Dairies v. Milk Control Commission, 318 U.S. 261, 275 (noting a state, unlike Congress, is powerless in the face of an adverse holding on supersession);

Connecticut L. & P. Co. v. Power Commission, 324 U.S. 515, 530.

CONCLUSION.

We shall not indulge in those emotional excesses which so often obscure truth, as do appellants when they attempt to label the declaration at bar as a "test oath," which, like so many ready-made labels, fails to fit the article to which it is applied. The test oath of history, unlike the declaration at bar, invaded the realm of private political and religious belief, particularly in deducing guilt from past action. (See: *American Communications Assn. v. Douds, supra.*) As we have demonstrated, advocacy of violent overthrow of the government is in a totally different category from any form of "political" activity. See: *Harisiades v. Shaughnessy, supra,* 342 U.S. at 592. In the quotation from Chief Justice Hughes in *De Jonge v. Oregon,* 299 U.S. 353, 365, which is relied on by the appellants, it was stated that our basic constitutional rights are designed "to maintain the opportunity for free *political* discussion, to the end that government may be responsive to the will of the people and that

changes, if desired, may be obtained by *peaceful means*". (Italics added.)[11]

Little can be said that is more appropriate on this subject than was stated by this Court in *American Communications Association v. Douds, supra,* 339 U.S. at 394:

> "Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. Freedom of speech thus does not comprehend the right to speak on any subject at any time."

It would be inconsistent indeed to deny to the several states the right of constitutional amendment and of legislation to protect valid state interests by measures narrowly drawn with regard to the protection of the civil and political rights of Americans. It would be particularly inappropriate to deny state control over a civil benefit which is given for the very patriotic purposes which conditions surrounding same are designed to protect. Under the authorities herein cited, advocacy of violent overthrow or armed hostil-

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[11]Chief Justice Hughes also stated, in the same case, just before the matter quoted:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse." 299 U.S. at 364.

ity to our government is not so preferred that an advocate must be given a special state tax exemption benefit intended by the state as an incentive to patriotism and as a reward for patriotic service.

We thus respectfully urge that the judgment of the Supreme Court of California be affirmed.

Dated, San Francisco, California,
March 26, 1958.

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(Appendix Follows.)

Appendix

UNITED STATES CONSTITUTION.

Amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 14, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI.

(Cl. 2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding.

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS.

California Constitution, Article XIII, Sec. 1¼:

The property to the amount of $1,000 of every resident of this State who has served in the Army, Navy, Marine Corps, Coast Guard or Revenue Marine (Revenue Cutter) Service of the United States (1) in time of war, or (2) in time of peace, in a campaign or expedition for service in which a medal has been issued by the Congress of the United States, and in either case has received an honorable discharge therefrom, or who after such service of the United States under such conditions has continued in such service, or who in time of war is in such service, or who has been released from active duty because of disability resulting from such service in time of peace or under other honorable conditions, or lacking such amount of property in his own name, so much of the property of the wife of any such person as shall be necessary to equal said amount; and the property to the amount of $1,000 of the widow resident in this State, or if there be no such widow, of the widowed mother resident in this State, of every person who has so served and has died either during his term of service or after receiving an honorable discharge from said service, or who has been released from active duty because of disability resulting from such service in time of peace or under other honorable conditions, and the prop-

erty to the amount of $1,000 of pensioned widows, fathers, and mothers, resident in this State, of soldiers, sailors and marines who served in the Army, Navy, Marine Corps, Coast Guard or Revenue Marine (Revenue Cutter) Service of the United States shall be exempt from taxation; provided, this exemption shall not apply to any person named herein owning property of the value of $5,000 or more, or where the wife of such soldier or sailor owns property of the value of $5,000 or more. No exemption shall be made under the provisions of this section of the property of a person who is not a legal resident of the State; provided, however, all real property owned by the Ladies of the Grand Army of the Republic and all property owned by the California Soldiers Widows Home Association shall be exempt from taxation.

California Constitution, Article XX, Section 19:

Notwithstanding any other provision of the Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; or

(b) Receive any exemption from any tax imposed by this State, or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

The Legislature shall enact such laws as may be necessary to enforce the provisions of this section.

California Revenue and Taxation Code, Section 32:
(Calif. Stats. 1953, c. 1503, p. 3114, Sec. 1).

Any statement, return, or other documents in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains.

Any person or organization who makes such declaration knowing it to be false is guilty of a felony.

This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution.

Revenue and Taxation Code, § 26:

If any provision of this code, or its application to any person or circumstance, is held invalid, the remainder of the code, or the application of the provision to other persons or circumstances, is not affected.